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No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1957

HOWARD LAWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Summary of argument	34
Argument	39
I. Exhibits 61A and 61B were not illegally obtained, were not covered by the pretrial orders, and there was no illegality in their use at the trial. No objection was made and any error would have been harmless	39
1. In May 1952 petitioner knowingly waived any privilege as to this check and stub and freely gave the Government a copy	41
2. Judge Goddard's order dismissing the 1952 indictments does not establish that the cancelled check and stub were privileged. Petitioner had no privilege with respect to them because they were the property of the Tavern Fruit Juice Company.	43
3. Neither district court order for the return of documents applied to copies made by the Government, nor did either party construe the orders as applying to the particular photostats	46
4. Petitioner's conduct at the trial was an independent waiver of any constitutional privilege against self-incrimination as to the check or stub	48
5. There was no possible unfairness or harm in using one particular copy of the check and stub rather than another	49
II. The prosecutor did not exceed the bounds of propriety and fairness	51

Argument—Continued Page

III. Petitioner was accorded full and adequate opportunity for cross-examination and other safeguards against the use of allegedly tainted evidence at the trial 59

IV. There was abundant evidence to support the verdict 61

Conclusion 71

Appendix A (Excerpts from formal hearing of May 12, 1952) 72

Appendix B (Copy of receipt of May 15, 1952) 77

CITATIONS

Cases:

Berger v. *United States*, 295 U. S. 78 56

Bowles v. *Merz Hide & Tallow Co.*, 153 F. 2d 146 52

Costello v. *United States*, 350 U. S. 359 43, 61

Crumpton v. *United States*, 138 U. S. 361 55

Curcio v. *United States*, 354 U. S. 118 43, 45

Gridley v. *United States*, 44 F. 2d 716, certiorari denied, 283 U. S. 827 56

Henderson v. *United States*, 218 F. 2d 14 56

Hirabayashi v. *United States*, 320 U. S. 81 70

Holt v. *United States*, 218 U. S. 245 43, 61

Jarris v. *United States*, 90 F. 2d 243 55

Kreinbring v. *United States*, 216 F. 2d 671 55

McIntosh v. *United States*, 1 F. 2d 427 55

Mendelson v. *United States*, 58 F. 2d 532 55

Mooney v. *Holohan*, 294 U. S. 103 [illegible], 56

Perlman v. *United States*, 247 U. S. 7 43

Pinkerton v. *United States*, 328 U. S. 640 70

Schino v. *United States*, 209 F. 2d 67, certiorari denied, 347 U. S. 937 55

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 44

Springer v. *United States*, 148 F. 2d 411 55

Tuckerman v. *United States*, 291 Fed. 958, certiorari denied, 263 U. S. 716 56

United States v. *Antonelli Fireworks Co.*, 155 F. 2d 631 52

United States v. *Battiato*, 294 F. 2d 717 56

United States v. *Giglio*, 16 F. R. D. 268 34

United States v. *Holt*, 108 F. 2d 365, certiorari denied, 309 U. S. 672 56

United States v. *Kortepeter*, 114 F. 2d 124, certiorari denied, 311 U. S. 711 55

Cases—Continued

	Page
United States v. *Lawn*, 115 F. Supp. 674	33, 43, 44
United States v. *Lee*, 274 U. S. 559	44
United States v. *Rote*, 208 F. 2d 467	34
United States v. *White*, 322 U. S. 694	45
Yam v. *United States*, 328 U. S. 624	44

Constitution and statutes:

Fifth Amendment	40, 43
Internal Revenue Code of 1939:	
Sec. 145 (a) (26 U. S. C. 1952 ed., Sec. 145 (a))	28
Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	2
Sec. 3793 (b) (26 U. S. C. 1952 ed., Sec. 3792 (b))	3
18 U. S. C., Sec. 371	3

Miscellaneous:

Hearings before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 81st Cong., 2d Sess., Part 3, pp. 21–50	26

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OPINION BELOW

The opinion of the Court of Appeals (R. 2963-2972) is reported at 232 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1956. (R. 2972.) A petition for rehearing, filed on April 26, 1956 (R. 2977), was denied on May 8, 1956 (R. 2996). The petition for a writ of certiorari was filed on June 4, 1956, and was granted on October 15, 1956 (R. 3002). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it was reversible error to introduce in evidence one photostatic copy rather than another o a check and check stub as to which petitioner had waived any privilege.

2. Whether it was reversible error for the prosecutor on summation to say that he believed certain witnesses were telling the truth, no objection having been made and defense counsel having previously suggested that the prosecutor had been instructed or he never would have put the witnesses on.

3. Whether petitioner was accorded both a fair opportunity for cross-examination and other procedural safeguards against the use at the trial of allegedly tainted evidence.

4. Whether the evidence was sufficient to support the verdict.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more

than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C 1952 ed., Section 145.)

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation.* Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3793.)

18 U. S. C.:

S. C. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission o
which is the object of the conspiracy, is a mis
demeanor only, the punishment for such con
spiracy shall not exceed the maximum punish
ment provided for such misdemeanor.

STATEMENT

On July 23, 1953, a 10-count indictment was file
in the United States District Court for the Southern
District of New York, charging violations of the in
ternal revenue laws (Sections 145 (b) and 3793 (b
of the Internal Revenue Code of 1939) and of the
general conspiracy statute (18 U. S. C. 371). Name
as defendants were William Giglio, Frank Livors
(see *Giglio and Livorsi* v. *United States*, No. 10, thi
Term), Louis Roth, and the petitioner, Howard Law
The essence of the charges may be summarized as
follows (R. 10-21):

Count	Individual Defendants*	Charge
1	Giglio, Roth	
2	Giglio, Roth	
3	Giglio, Roth	
4	Giglio, Roth	
5	Giglio, Roth	
6	Livorsi, Roth	
7	Giglio, Livorsi, Law, Roth	
8	Livorsi, Law, Roth	
9	Giglio, Livorsi, Law, Roth	
10	Giglio, Livorsi, Law, Roth	

* Each of the substantive counts was directed against the individual defendants named therein. In each conspiracy count, the defendants named therein were charged with conspiring with each other and with unindicted co-conspirators.

Roth pleaded guilty and testified for the prosecution, and Lawn, Giglio, and Livorsi (hereafter described as the petitioners)[1] were found guilty as charged after a jury trial lasting six weeks. (R. 3, 7, 2735.) Lawn was sentenced to a year and a day on each of three counts, the sentences to run concurrently. (R. 2761.) In an opinion by Chief Judge Clark, the Court of Appeals unanimously affirmed. (R. 2962–2972.)

A. EVIDENCE TO SUPPORT THE VERDICT

To establish its case, the Government offered evidence (1) that the petitioners conspired to evade assessment and payment of federal income taxes on over a million dollars of income earned in the sugar black market of World War II; (2) that petitioners operated through the media of several partnerships and corporations; (3) that Giglio and Livorsi were the principals in the conspiracy, Giglio being the chief executive of most of the companies, and Livorsi having an equal interest with Giglio in all of the enterprises; and (4) that Lawn and Roth provided the legal and accounting services required to carry out the conspiracy.

In broad outline, the Government submitted proof that the petitioners employed three methods to evade

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[1] This is a consolidated case to No. 10, this Term, *Giglio and Livorsi v. United States*, to be argued immediately following this case. All three petitioners were convicted as co-conspirators at a common trial where they had the same counsel. In view of the impossibility of separating the evidence of the conspiracy from that of the part which each played, the full factual statement is set forth in this brief and reference will be made in the Government's brief in No. 10.

tax assessments. One method was the fraudulent allocation of income among the many companies and individuals in the conspiracy, resulting in application of a much lower tax rate than would have been applied if the income had been properly reported by those to whom it was taxable. The second method was the gross overstatement of expenses in the income tax returns, and the third method, less extensively used, was omission of income. Moreover, the Government offered proof that the petitioners were not content with evading assessment of much of their tax liabilities, but also evaded *payment* of over 97% of the taxes which were admittedly owed. This evasion of payment was accomplished in two ways. First, tax liability was concealed from the Government for as long a time as possible. Second, all assets were concealed by the time Government collection procedures were instituted. The Government also undertook to show that in order to prevent the Government from detecting the evasions the conspirators had destroyed and fabricated evidence and had attempted to intimidate prospective witnesses. The details of this proof may be summarized as follows:

1. *The Eatsum partnership.*—Between April 1944 and May 1945 David Lubben conducted the business of Eatsum Food Products Company as a sole proprietorship, engaging in the purchase, sale and manufacture of candy. (R. 294–295.) Sugar was rationed, and Lubben, having no ration quota, bought what sugar he could obtain in the black market. (R. 295, 298.) Louis Roth, an accountant, had been hired by petitioners Giglio and Livorsi to "legitima-

tize" money they had made. (R. 1235.) He advised Lubben that their organization owned a jelly plant, Tavern Fruit Juice Co., which had just received ration certificates for fourteen million pounds of sugar, and that he was sure that with their connections they could get a sugar quota for Lubben. (R. 298, 324.) Roth stated that his organization was interested in Lubben's business, and he got Lubben's permission to bring in an accountant to go over Lubben's books. As a result, on June 12, 1945, a partnership was formed known as Eatsum Food Products Company, Ltd. (R. 298, 300, 302–303.) Lubben and Giglio were general partners, each, with their associates, owning 50% of the business. (R. 300, 302–303.) Livorsi owned a half of Giglio's interest in Eatsum, just as he did in Giglio's other enterprises. (R. 1074, 1187, 1543.)[6] Lubben's sole reason for selling an interest in Eatsum was to get a sugar quota. (R. 841.)

2. *Cash deals.*—In his pre-partnership black market transactions Lubben had always kept a careful record of his under-the-table currency payments to suppliers, drawing checks to cash for such amounts, recording the currency payment on the invoices, and reflecting the true cost of the merchandise on his books. (R. 304–305, 1721–1723.) Shortly after Eatsum became a partnership, Lubben was advised by Roth that neither he nor Giglio wanted black market currency payments to be recorded in the future because in that

[6] The Giglio group consisted of Giglio and Livorsi and their wives, and a relative of Giglio, one Lopertido, who owned only a 5% interest. (R. 302–303, 909–910.)

way "you may involve other people that you ha
given this cash to." (R. 309, 1026–1027.) As a r
sult, Roth instituted a cash box system, whereby th
proceeds of cash sales of candy were placed in a bo
from which currency was paid out in black marke
transactions. (R. 309, 1027, 1418.)

In the summer of 1945 there came into existence
second cash box, referred to as the "corn box." (4
315–316, 1418, 1544–1545.) At that time corn syrup
like sugar, was very scarce. Manufacturers allocate
it to their old customers on a quota basis, and Eatsu
had no such quota. (R. 316.) Lubben learned tha
some corn farmers in the west had plenty of corn bu
would not release it to the corn refineries until the
received a black market premium. (R. 316-317.
Lubben so advised Giglio, pointing out that if the
could get corn delivered to refineries by paying pre
miums to farmers, they could then get corn syrup
from the refineries. (R. 317.) Giglio replied that
"sounded very good and he would check it with" peti
tioner Lawn, another employee. (R. 318.) Giglio
told Lubben that Lawn "was a former United State
District Attorney, and that he had a terrific entry
with some of the highest government offices and tha
he was a part of the organization, and that he [Giglio
felt that Mr. Lawn was there to prevent any trouble."
(R. 329.) A refinery was found, a check was drawn
to cash, and an agent of Eatsum began to pay cur
rency premiums to the farmers. (R. 319-320.)

When the corn syrup began to arrive, Giglio told
Lubben, in the presence of Roth, that he "was not in
this business just for the sake of becoming a large

taxpayer" and that "this opportunity was going to make a fortune and he was not going to pay it all out in taxes * * *." (R. 337.) Giglio accordingly insisted that the syrup be sold at an invoice price plus "a cash amount over". (R. 337–338.) Thereafter, the over-invoice amounts were received in currency and kept in the corn box. (R. 344–345.) Three or four weeks after the corn syrup deal got under way Giglio advised Lubben that he should no longer concern himself with buying the corn because "Howard Lawn had much better connections and that he would take care of it." (R. 333.) Lawn verified this, and told Lubben that with his connections they "could get it better and cheaper and faster * * *." (R. 333.)

Within a period of three or four months in the latter part of 1945 [illegible] in currency went through the corn box. (R. 356–357, 1091, 1544–1545.) None of this money was recorded on the books. (R. 358, 921, 1723.) Some time in the autumn of 1945 Giglio told Lubben that he had taken the corn box to his home and placed it in a safe because "it was too much money to be kept in the office." (R. 348.) At that time the box contained approximately $140,000 in cash profits, none of which was ever recorded on the books or reported as income in the partnership return. (R. 358, 384, 921, 1023–1025, 1031, 1723, 1853–1854.)

3. *Fraudulent allocation of income to corporations.*—In about September 1945, Lubben was called into Giglio's office. Roth was present and, to the best of Lubben's recollection, so was Lawn. Giglio stated that the profits from candy and corn syrup were "becoming terrific, and that he wasn't [illegible] to pay

ing a lot of income tax and something had to be don
and done quick." (R. 367.) Giglio said that it ha
been decided to form a number of corporations
syphon off the profits of Eatsum by means of fal
invoices; that these corporations would be in existen
only a few months, and would be dissolved before
came time to pay income taxes so that they wou
not have to pay; and that Roth would provide furth
details. (R. 367-368.) Roth did so. (R. 368-369
Lubben advised them that he "wanted no part" of an
such arrangement. (R. 368.) When Lubben was
vacation in January 1946, Giglio told Beren, Lu
ben's accountant, that he had formed a new corpora
tion to take over the assets of the Eatsum partne
ship, and suggested that Beren try to convince Lubbe
that it would be to his advantage to operate as a co
poration rather than a partnership. (R. 1688, 172
1727.)

Early in March 1946, Lubben, having decided
withdraw from the Eatsum partnership, asked f
his $70,000 share of the corn box profits. Giglio r
torted that Lubben had no such money coming to hi
and, in the presence of Livorsi, Roth and others, o
dered him to "get the hell out" of the office. (
358-359.) Over the protests of Giglio, Roth an
Lawn, Lubben withdrew from the partnership o
March 9, 1946. (R. 359-360, 361-362, 399-400, 172
1727.) The preliminary dissolution agreement pro
vided that, in return for Lubben's 50% interest i
Eatsum, Giglio would assign the plant and equipment
to Lubben and assume payment of that portion o
Lubben's liability for 1946 federal income taxes whic

was attributable to Lubben's share of the profits of Eatsum for the fiscal year ended May 31, 1946. (R. 399, 1763–1765.) Lubben agreed to buy the Eatsum inventory of merchandise for $339,052.77 (R. 401–402, 1697–1698), a part of which was to be paid off in a series of forty notes, payable weekly to Giglio, in the amount of $2,500 each (R. 364, 381, 402). At about the time of the dissolution Roth asked Giglio, "What about the cash box?" and Giglio replied: "Never mind, I took care of that." (R. 1029–1030.)

With the departure of Lubben, Giglio and Livorsi became virtually the sole owners of the Giglio group of enterprises with offices at 29 Rector Street, New York City. (R. 325.) Chief among these was the American Brands Corporation, which had been incorporated on January 8, 1946 (R. 1865–1866, 1878), and which had taken over the business of the Tavern Fruit Juice Company, a partnership owned by Giglio and Livorsi and their wives. (R. 1152, 1131.) The minute book of this corporation disclosed that Giglio and Livorsi and their wives held 98% of the 1,000 outstanding shares, and Lawn and Roth one share each. (R. 1912–1913, 2046.) Giglio was president and treasurer, Lawn was vice-president, and Roth was secretary. (R. 1915.) During Lubben's association with the group, Tavern had engaged in the manufac-

ture of jelly, which it sold to Eatsum. (R. 324, 34
1152.) Near the end of November 1945, Tavern ha
ceased making sales but continued to manufactu
jelly and acquire inventory. (R. 1240, 1924.) N
closing inventory was included in computing the ta
able income of Tavern for its last taxable year. Th
inventory was sold by The American Brands Corpo
ration during the first few days of its existence, i
January 1946. (R. 1877-1878.)

4. *Organization and ownership of corporations.*
The business of the Eatsum partnership was take
over by a second new corporation, American Brand
Wholesale Corporation, incorporated March 23, 1940
(R. 1152, 1912.) Also incorporated at approximately
the same time were the American Agar Corporation
(which engaged in research relating to the manufac
ture of sugar, jellies and jams), the American Sweet
Corporation, and the American Trucking and For
warding Corporation. (R. 1131, 1912.) Although the
stock certificate books show that Lawn held substantia
interests in four of the companies (R. 2946), Giglio
told Roth and others that he (Giglio) and Livorsi
were 50-50 owners of all the enterprises except Ameri
can Agar Corporation, in which Lawn had a 25%
interest (R. 1074, 1116, 1187). Giglio gave Lawn
these shares, over Livorsi's objections, in considera
tion of work done by Lawn on research. (R. 1141
1142.)

Although Livorsi owned half the business, [illegible]
he had no separate office of his own, being in charge
of jelly production at the Tavern (later American
Brands) plant. (R. 327, 1585, 1588.) When he came

to 19 Rector Street he invariably conferred with Giglio. (R. 327–328.) Giglio was, of course, accountable to Livorsi for half the profits (R. 1073–1074) and for this reason Livorsi signed unusual or "special" checks, so that both he and Giglio would know what they were for (R. 1073). On some occasions, when Giglio wanted money he would get it from Roth by having the latter draw and cash a company check which would be payable to Roth and which would be recorded on the books as a company loan to Roth. The purpose was to avoid complaints which would be made by Livorsi if he knew that Giglio was getting the money. (R. 1073–1074.)

Roth supervised the bookkeeping and prepared the tax returns, although the final decision "of what to do rested with Mr. Giglio." (R. 1076.) Before he became associated with Giglio and Livorsi, Roth was earning between $10,000 and $15,000 a year; afterward, about $50,000 a year. (R. 1236–1237.) Roth admitted that reasonable compensation for his services would have been less than he got. (R. 985–986.)

5. *Fraudulent bookkeeping entries.*—After the formation of the "American" corporations, a number of devices were used to evade taxes. No income tax was withheld on the salaries or other drawings of Giglio, Livorsi, Lawn or Roth. (R. 1183, 1922–1923.) Giglio advised Roth that it would be necessary for Giglio to withdraw more money from the business than the books would reflect. Roth first suggested that Giglio withdraw the money and pay taxes on it, but Giglio instructed Luigi to withdraw the funds and charge them

to various expense accounts. (R. 1009.) Roth then devised a system of distributing such withdrawals to various expense accounts "so that it looks good when an examiner comes down, a revenue agent comes down to examine the books." (R. 1009.) Substantial drawings were made under this system. (R. 1010–1011, 1014.) On one occasion Giglio inquired as to the bank balance of a small associated corporation known as the Barlan Corporation. (R. 383, 1188.) Roth advised him that it was in excess of $10,000, whereupon Giglio instructed Roth to draw a check in favor of Giglio's brother, Raymond, in the amount of $10,000, and to "try to use it as a deduction for expenses." (R. 1188, 2313.) Roth did so, cashed the check, and turned the proceeds over to Raymond Giglio in bills of $20, $50 and $100 denominations. (R. 1188–1191.) As Roth summed it up on cross-examination, "There were a great many entries on the books that were fraudulent." (R. 1535.)

6. *False and delayed returns.*—On March 12, 1946, Roth prepared and filed a declaration of Giglio's estimated individual income tax for 1946, showing an estimated tax of $4,000. The first quarterly payment of $1,000 accompanied the estimate. (R. 1040, 1081, 1836.) In or about June 1946, Roth prepared an amended declaration, estimating the tax at $11,000. Giglio refused to file this, ordering Roth to "duplicate the first declaration". (R. 1040–1041.) This was after the close of the fiscal year for both the Eatsum and Tavern partnerships, and Giglio's distributive share of [illegible] in the ventures [illegible] on his

1946 individual return) was shown by the books (exclusive of unrecorded and unreported income) to be in excess of $170,000. (R. 1004, 1838, 1870, 2934, 2939, 2943.)

The partnership return of the Tavern Fruit Juice Company was due to be filed June 15, 1946, inasmuch as its fiscal year had ended March 31, 1946. (R. 1003–1004, 1838.) The return for the Eatsum partnership was due to be filed August 15, 1946, its fiscal year having ended May 31, 1946. (R. 1004, 1838, 1870.) At about the time these returns were due, Giglio instructed Roth not to file them, pointing out that such a course was necessary so that the Government would not "be apprised or have knowledge or some record that there is money due * * *." (R. 1004.) Around September 1946, Roth prepared an amended declaration of Giglio's estimated individual income tax for 1946, putting the amount at $11,000. Giglio, as he had done three months earlier (*supra*, p. 14), instructed Roth not to file that document but to "duplicate the first declaration", which had estimated the tax at $1,000. (R. 1040–1041.) In January 1947, Roth refused to "go along on those declarations because they [were] 'way out of line" (R. 1078), and insisted upon filing an amended declaration estimating the tax at $26,000. Giglio reluctantly agreed to file such a declaration, but instructed Roth to send only the usual quarterly check for $1,000. (R. 1078–1079.) Giglio's income tax liability for 1946, as reflected on the final return eventually filed, was $232,978.73, of which only $88,000 had been paid at the time of the trial. (R. 2947.)

In the spring of 1947 tentative tax returns for the American Brands Corporation and two other "American" corporations were filed, each showing an estimated income tax liability for 1946 of $100. (R. 1119-1120, 1922.) The tax liability reflected on the consolidated return eventually filed in September was $104,701.35. (R. 2945.) Much of the cash which American Brands had in the spring had been dissipated by the time the return was filed. (R. 1523-1530.)

With the end of sugar rationing in the spring of 1947, the profitable war and post-war black market in sugar and its substitutes came to a halt. The Giglio-Livorsi enterprises "began to go downhill" (R. 1530), and Roth estimated that in six or seven months in the early part of 1947 "the various corporations sustained a loss of about $150,000" (R. 1243), as compared with a book profit of $342,152.97 in 1946 (R. 2945). Between March 1947, and mid-September 1947 (when the returns were all overdue), no returns were filed by the corporations, individuals or partnerships, although some of these returns had been prepared six or seven months earlier. (R. 1002, 1031, 1171, 1197.)

The return of the Tavern Fruit Juice partnership was filed September 12, 1947, fifteen months late. (R. 1004, 1497.) Roth did not sign it because he knew it was false. (R. 987.) It was false in that it omitted a closing inventory (*supra*, p. 12) in the amount of $72,321.17 and overstated "Experimental and Research Expense" by $32,780.93. (R. 988-989, 991-993, 1070, 1876-1877, 1881-1885, 2039-2040.)

The return of the Eatsum partnership was filed in September 1947, thirteen months late. (R. 1004, 1838.) It was false in that it omitted the $140,000 profit in the corn box from the corn syrup operation (*supra*, pp. 8-9, 10). (R. 358, 920-921, 1024, 1850, 2031.)

Roth filed the return of the "American" corporations for the calendar year 1946 on or about September 15, 1947. That return was filed only four months late because Roth had secured extensions of time to May 15, 1947 to file it. (R. 1007-1008, 1474, 1922.) That return was false in that it was a consolidated return of five corporations, showing American Brands as the parent. American Brands was not the parent and Roth knew that separate returns were required to be filed. (R. 1038, 1111, 1113, 1850, 1905-1909, 1911.) The understatement of income tax resulting from the improper consolidation was $86,207.11. (R. 1906-1907, 1909-1910, 2045.)

The 1946 individual income tax returns of Giglio and Livorsi were filed, like those of the partnership and corporations, about September 15, 1947. The time for filing these returns had been extended to either June or July 1947. (R. 1007-1008, 1474.) Roth did not sign the returns because he knew they were false. (R. 1037.) They were false in that they each understated by $40,436.22 the partners' distributive share of profits from the Tavern Fruit Juice partnership (*supra*, pp. 12, 16; R. 2039-2040, 2043-2044) and each omitted $20,780.23 of profits realized from the sale of five tank cars of corn syrup received

shortly after Lubben's departure (R. 392–397, 1030–1031, 1892–1896, 2942–2944).[1] No returns were filed on behalf of the wives (R. 1888), the wives being claimed as exemptions and their supposed share of the profits from both of the partnerships being reflected on the husbands' returns (R. 997–998, 999–1001). This was done at the suggestion of one Ronayne, a tax consultant,[2] who pointed out that since they did not intend to pay the tax, there was no use in causing trouble for the wives. (R. 1000–1003.) As Roth explained it, "it was never intended at that time to pay" the tax and therefore the wives

[1] It should be noted that there was a further understatement of income on the individual returns by reason of (1) the omission of the cash profits in the corn box, totaling $140,000 (*supra*, pp. 8–9, 10, 17), partially offset by an item of $30,000 reported by each of the two partners on their individual returns as miscellaneous income; and (2) an improper distribution of profits on the Eatsum partnership return, picked up on the individual returns. (R. 1031–1033, 1854–1855, 1860–1861, 1987–2018, 2934, 2943–2944, 2947.) However, the trial judge withdrew from the jury's consideration the whole issue of unreported income from Eatsum on the individual returns (Counts 5 and 6) because of legal issues relating to the difference between a partner's distributive share of income and the amount he actually receives. (R. 13–14, 1981–2018, 2444–2486, 2722–2725, 2728–2731.)

[2] Ronayne, who was formerly associated with the Treasury Department, was retained in 1946 at a fee of $10,000 per year, to supervise generally all tax matters involving the Giglio-Lavorsi enterprises. (R. 352–353, 999, 1076.) Although the declarations of estimated tax (*supra*, pp. 14–15) had been filed in the Second Collection District, Ronayne instructed Roth to file the final returns in the Third Collection District because "he is in a better position to take care of the tax examination from the Third District than he is from the Second District." (R. 1076.)

income was reported on the husbands' returns "so that all the trouble would accrue to the husbands." (R. 1003.)

7. *Liquidation and concealment of assets:* The 1946 individual and corporate returns, as filed, reported a total income tax liability of $573,683.73. As of the time of the trial, in 1955, a total of $16,735.95 had been paid on these obligations. (R. 2947.) These returns, as well as those of the partnerships, were all filed between September 10, 1947, and September 15, 1947. (R. 1002, 1474.) By that time, or within a few days thereafter, the visible assets of the individuals and the companies had been, for all practical purposes, liquidated.

Between March 15, 1947, when the tax returns were due, and September 15, 1947, when they were filed, Giglio withdrew from the corporations a total of $58,808.34, and Lavorsi, a total of $30,058.33, including their salaries. (R. 1921–1922, 1923.)[1] In September 1947, the corporations sold their furniture and fixtures for $10,000. (R. 1192–1193.)

During the spring of 1946, Giglio had become interested in purchasing a home in northern New Jersey. Lawn introduced him to a realtor, who showed them several "fine homes, estate homes". (R. 948–949.) Giglio expressed a preference for the home of the late Senator Warren Barbour and, after brief negotiations, purchased it for $100,000. (R. 949, 951–952.) About two weeks later, Lawn and Giglio advised the

[1] Earlier in 1947 Lavorsi's drawings were even heavier. From the beginning of that year to mid-June he withdrew $36,558.33. (R. 1916–1917, 1922–1923.)

realtor that an associate of theirs might be interested in buying the estate of boxing promoter Mike Jacobs. Lawn and Giglio introduced Livorsi to the realtor, who took them to see the property. Jacobs was asking $100,000 and Livorsi's highest offer was $85,000 (R. 961.) A week or two later, however, Lawn, Giglio, Livorsi and the realtor went to see Jacobs. It was suggested that the realtor "wait outside with the ladies." (R. 961–962.) When he returned he was advised that a price of $90,000 had been agreed upon. (R. 962.)

In mid-September 1947, Livorsi sold this estate for $85,000. After deduction of $11,070.26 to cover an outstanding mortgage, and various other adjustments, Livorsi received a check on September 19, 1947, in the amount of $64,335.49. (R. 962–963, 2059–2060.) On September 25, 1947, Livorsi cashed this check at a New Jersey bank, received the money mostly in $100 bills, put it in his belt and walked out. (R. 2062–2065, 2072.)

Early in September 1947, Roth was called into Lawn's private office, which was next to Giglio's. (R. 327, 1229.) Giglio, in Lawn's presence, said he would "sell" his $100,000 home (*supra*, p. 19) to Roth in consideration of $20,000 that Giglio owed Roth, plus certain "additional money in order to keep up the payments, and in that way I will have a roof over my head in case the Government assesses me and will not be able to take the house * * *." (R. 1226–1224.)

Livorsi had sold certain personal property for $3,050 at this time and received a separate check for that amount. (R. 2058, 2060.)

oth consented. Lawn "agreed that it would save r. Giglio's home, and protect" Roth, and stated that would have a New Jersey lawyer acquaintance aw up the papers. (R. 1220.) It was understood at Roth would make payments on the mortgage and xes, and that when the house was finally sold he uld get back his money plus the $20,000 Giglio ed him. (R. 1221.) Several days later, on Septem- r 11, 1947, the closing took place in Lawn's office. e papers had been drawn up by an attorney named pper, who handled the closing. Although Tepper l not represent Roth, Roth gave him a check for 0 at Lawn's suggestion in order "to make it look od". (R. 1220, 1222.) Roth wrote two checks of 00 each in favor of Giglio, assisted him in cashing m, and Giglio left the bank with $10,000 in bills of , $50 and $100 denominations. (R. 1223, 1225- 26.) On September 19, 1947, Giglio sold his interest a company known as the Van Dyk Industrial Cor- ration, receiving a check for $15,000 which was de- sited in the bank account of the American Brands rporation. (R. 1170-1171.)

During October and November, 1947, Giglio, Law l Roth discussed the desirability of receivership bankruptcy. Lawn suggested that it would be more vantageous to go into receivership in New Jersey . 1245.) New Jersey receivership proceedings, in ving American Brands and the related corpora- ns, began on December 2, 1947, with the filing of reditor's complaint for approximately $4,500. (R.

The estate had been put up for sale in the spring of 1947 remained unsold. (R. 969-970.)

2154, 2160, 2206.) During the receivership proceedings, Roth gave false testimony by pre-arrangement with Giglio and Lawn. (R. 1143, 1175–1180, 1532, 1534.) The sale of the corporation's assets netted $22,818.06, of which about $10,000 went for receiver's fees. General creditors received about 10% of their claims. (R. 2189–2190, 2233–2234, 2350, 2417–2418.) The plant of American Agar Corporation, which had cost in excess of $200,000 (R. 1923–1924), was sold by the receiver for $15,000 (R. 2264–2265); a few years later Giglio, through the Heparin Company, was still operating that plant (R. 2316–2317, 2319).

In 1950 Giglio went through bankruptcy in New Jersey. Only thirteen days before he signed the schedules in bankruptcy he had sold his automobile for $1,400 cash, none of which was turned over to the trustee. Substantially all of his assets were already in his wife's name, the balance being sold to her in the bankruptcy proceedings for $100. (R. 2269–2279.)

8. *Attempted intimidation of Beren.*—Although Lubben's actual withdrawal from the Eatsum partnership had taken place on March 9, 1946 (*supra*, p. 10), the formal dissolution agreement had not been signed at that time, nor had title to the plant been transferred to Lubben in accordance with the preliminary dissolution agreement. (R. 410–411, 1699, 1762–1764.) Late in the spring of 1946 Lubben called upon his accountant, Beren, and advised him that Giglio refused to give him title to the plant which Lubben was then operating as General Confections,

Inc.) unless he would agree to the destruction of all of Bereu's working papers relating to the Eatsum partnership. (R. 1699.) Bereu had made an extensive monthly audit for Lubben of Eatsum's operations* every month through January 1946, and had a large file of working papers, including monthly financial statements. (R. 1408–1409, 1688, 1700.) Bereu told Lubben that working papers belonged to the accountant who had prepared them, and not to the client. Lubben replied that Giglio insisted that the working papers be turned over to him or destroyed; otherwise he "simply would refuse to go through with any deal with Mr. Lubben." (R. 1700.) Bereu finally consented to permit Giglio to destroy the papers, but, before the destruction was accomplished, Bereu had photostatic copies made of the most important ones. (R. 1700.) Shortly thereafter Giglio and Roth called upon Bereu. Roth and one of Bereu's assistants systematically destroyed working papers belonging to Bereu, tearing them up, flushing some down the toilet, and carting others out in waste baskets. (R. 1099–1101, 1420, 1700, 1744.) Giglio told Bereu that the papers were being destroyed because Giglio "wanted to know that his partnership affairs were kept within his control and that no outsider knew anything about them", and warned Bereu that they had ways of taking care of any man who talked about their affairs out of turn. (R. 1701.) Thereafter, on June 5, 1946, the formal dissolution

* Except the corn box operations (*supra*, pp. 8–9), which Roth would not permit Bereu to audit, and which did not appear on the books. (R. 1723.)

agreement of the Eatsum partnership was executed. (R. 410–411.)

9. *Attempted intimidation of Lubben.*—In September or October 1948, Treasury Agent Theodore Present was assigned to a joint investigation of the income tax returns of Lubben, Giglio, Livorsi and the Eatsum and Tavern partnerships. (R. 1835, 1928, 1931.) Even before that time a Treasury agent named Twohig had been engaged in a similar inquiry, and in the summer of 1948 had interviewed Lubben. (R. 461–463, 1930.) When Lubben's 1946 income tax return was being prepared, his accountant had been obliged to reconstruct Lubben's distributive share of partnership income from Eatsum because Roth and Giglio had refused to make the partnership books available. Finally Lubben made a formal demand for the books by registered mail, return receipt requested. This demand having failed, Lubben attached to his income tax return a copy of the dissolution agreement, a copy of the return receipt, and an explanation. (R. 372, 735–736, 751–752.) A further difficulty between Lubben and Giglio arose because Giglio had never paid the amount of Lubben's 1946 income tax liability resulting from Lubben's connection with Eatsum, as Giglio had agreed at the time of dissolution. (*Supra*, pp. 10–11; R. 371–372, 737, 1936.) Lubben had recouped some $17,500 of this amount by failing to pay the last few of the forty $2,500 notes payable weekly to Giglio on account of the Eatsum inventory (*supra*, p. 11; R. 865–866, 893, 1486–1487), but Giglio still owed Lubben approximately $23,000 (R. 372, 871–874).

Early in 1949, after the Government had been pressing him for some time for payment of his 1946 income taxes, Lubben, in the presence of Ronayne, Roth and Lavin, demanded that Giglio pay him the $23,000. (R. 370–372.) When Giglio refused, Lubben became angry and told him that he was going to the Treasury agents' office and "tell the whole stinking, rotten mess." (R. 374, 1067.) Lubben testified that he had been warned earlier by Giglio to stay away from the agents and to "keep my mouth shut," and that Roth had once told him that "if I ever opened my mouth I would find myself at the bottom of the Hudson River in a cement box." (R. 375, 377, 1067.) Ronayne tried to dissuade Lubben from acting hastily, but Giglio told Roth he need not worry because "Lubben will never reach the witness stand." (R. 374, 1067.)

In 1949 Lubben cooperated with the Treasury agents, turning over large quantities of records, many of them relating to the operations of Eatsum at the time he was there. (R. 346–347, 379–380, 412, 473–474.) In 1949 the agents obtained virtually all of the books of the "American" corporations, and some records of the Tavern Fruit Juice partnership, from the New Jersey receiver. (R. 1934–1937.) Later, Bozzo turned over to the agents all of the photostatic copies of working papers relating to the Eatsum partnership that he had made in 1946 just prior to their destruction. (*Supra*, p. 23; R. 1719, 1720, 1872–1873.)

In August 1950, Lubben testified extensively regarding his association with the Giglio-Livorsi interests in public hearings before the Kefauver Committee. (Hearings before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 81st Cong., 2d Sess., Part 3, pp. 21–50.) The evidence upon which the Committee based its examination had been furnished by the Treasury agents investigating the case. (R. 97.)

10. *Reliance on ineffective*. On September 14, 1950, three informations were filed in the Southern District of New York charging that Giglio, Livorsi, Lawn and Roth had wilfully caused American Brands Corporation to fail to pay its 1946 income taxes, and that Giglio and Livorsi had wilfully failed to pay their 1946 individual income taxes. (R. 28–29.) Shortly thereafter, Lawn advised Roth that he was well acquainted with a former Department of Justice attorney who in turn was well acquainted with the United States Attorney in New York City; and that it was planned to retain him "to present our case to" the United States Attorney, "for the purpose of cancelling the information". (R. 1217–1218.) Later, Lawn told Roth that he had persuaded the then Assistant Attorney General in charge of the Tax Division, Department of Justice, to dismiss the informations, but that the United States Attorney had refused to do so because the Assistant Attorney General refused to put the instructions in writing. (R. 1237–1239.) Still later, when a New Jersey grand jury was inquiring into Lawn's personal income taxes, Lawn assured

Roth that Lawn's friend, the United States Attorney, would keep him advised as to the details of the proceedings. (R. 1074–1075.)

In 1952, before the first indictments in the instant case were returned, Roth, on the advice of counsel, offered Assistant United States Attorney Leone his cooperation in the instant case. (R. 1235, 1246, 1273–1274.) Leone refused to accept Roth's cooperation prior to the disposition of some criminal charges against him regarding alleged false statements to the R. F. C. (R. 1266.) One or two days after Roth's offer of cooperation, Giglio called him, arranged a meeting and said, "I understand that you are talking to the Government about these tax matters." When Roth answered that he was following the advice of counsel, Giglio made what Roth understood as a threat against his son. (R. 1066.)

In mid-1953, when Roth said to Giglio and Lavorsi that he wanted "to separate and have my own counsel" (R. 1218), Giglio charged that a great deal of the trouble was the result of the manner in which Roth had kept the books. Roth testified (R. 1218):

> * * * I pointed out to him in front of Mr. Lavorsi that it isn't my fault, that it is the fault of our depending on the contacts and influence of Jim Romayne in the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent

any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

B. PRE-TRIAL PROCEEDINGS

On September 14, 1950, as stated (*supra*, p. 26), three informations were filed in the Southern District of New York charging that petitioners and Roth had wilfully caused American Brands Corporation to fail to pay its 1946 income taxes, and that petitioners Giglio and Livorsi had wilfully failed to pay their 1946 individual income taxes, in violation of Section 145 (a) of the Internal Revenue Code of 1939. (R. 2763, 2764–2766, 2783–2784.)

On May 12, 1952, a formal hearing was held in Newark at Lawn's request in connection with his individual income tax. Lawn was told that "It is an administrative hearing permitting you to testify preceding a proposed criminal prosecution." (Tr. 2.) He was formally advised of his privilege against self-incrimination and warned that anything he said might be used against him in "any proceedings which the government may bring against you." (Tr. 1, *infra*.

[illegible] The transcript of this hearing was not introduced at the trial where Lawn did not raise any issue of self-incrimination. At the Court of Appeals the Government made an offer of proof. (R. 2971.) We are confident that petitioner will not dispute the existence of the facts set forth and believe they are relevant to the legal issues first raised on appeal by petitioners. [illegible] copies of the full transcript of the administrative hearing have been filed with the Clerk and a copy provided petitioner's counsel. It is to be printed in Appendix A, *infra*, p. 2a, [illegible]

p. 73.) Lawn was accompanied by counsel and placed under oath. He was told that the difficulty concerned an item of $15,000. Lawn stated that the item had been a personal loan to him from Giglio and produced a canceled check for that amount payable to him drawn on the Tavern Fruit Juice Company and signed by Livorsi. (*Infra*, p. 74.) Giglio and Livorsi were at the hearing at Lawn's request. All three, advised of their rights and under oath, discussed the check and the corresponding check stub. (Tr. 4–36.) They agreed to supply the Department of Justice with photostatic copies of the check and stub (Tr. 35) which was done three days later. (App. B, *infra*, p. 77.)

On July 7, 1952, there was served upon Roth, through his attorney, a subpoena *duces tecum* ordering him to appear before the grand jury on July 14 to testify and to produce all the books and records of nine corporations and three partnerships comprising the Giglio-Livorsi interests. (R. 2784–2786.) On July 8, 1952, similar subpoenas were served upon all of the petitioners, through their attorneys, returnable July 15. (R. 2786–2788.)

All four appeared in response to the subpoenas. Roth testified that he did not have any of the books and records called for and had not seen them for several years. (R. 2789–2795.) Livorsi testified that he had never seen any of the books and records of any of the enterprises. (R. 2795–2797.) Lawn, who had formerly been Chief of the Criminal Division of the Office of the United States Attorney for the Dis-

trict of New Jersey, produced the originals of four documents belonging to the Tavern Fruit Juice Company, a Giglio-Livorsi partnership, of which Lawn was not a member. These documents consisted of three cancelled checks, by which the partnership had paid certain sums to Lawn, and the partnership checkbook stub relating to one of these checks. One of these checks and the stub were the documents of which he had given the Government copies in May 1952. In Lawn's presence the four documents were marked Grand Jury Exhibits 1 to 4 and dated 7/15/52. (R. 2802, 2998, 3000.) Lawn asked and received permission to retain the original documents which he had produced and said that he would be glad to furnish a photostatic copy. The foreman of the grand jury suggested that the Government attorney, Jerome Leone, photostat the documents and return them to Lawn. Lawn testified that the original documents which he had produced were the only records in his possession, and that he had never seen any of the other records except some of the minute books and stock transfer books which he had seen at the time of incorporation. (R. 2798-2803.)

Giglio testified that he had not brought any of the requested records with him "only because I have not had sufficient time to look for them and gather them together" and would be "very happy to bring them in" if granted a little more time. (R. 2805.) He stated that "practically all of these companies and corporations turned over the books and records to the Internal Revenue Department on some date in

1949" (R. 2805); that he would like to have 30 days in which to locate the records remaining in his custody and would bring in everything that he could find because he had nothing to hide (R. 2806–2807); that he had not seen some of the books and records since 1947 or 1948 when some of the companies went into receivership (R. 2808–2814); and that, while he intended to produce them all before the grand jury, he "would like to make photostats of those things that [his] accountants and attorneys think they will need to defend" him with respect to the criminal informations filed against him in 1950 (R. 2814). When asked to state where the books and records were stored after they were removed from the home office of the companies, Giglio three times refused to answer, claiming his "constitutional privilege." (R. 2815.)

The Government attorney then limited his questions to the location of the books and records of the American Brands Corporation. Giglio persisted in invoking his privilege and, at his request, was excused from the grand jury room in order that he might confer with his attorney. (R. 2816.) When he returned, he continued to assert privilege with respect to the corporate books and records, repeating however that if given time, he would produce everything that he could find. (R. 2817.) After again being excused to confer with his attorney, Giglio refused to answer questions relating to the location of the records of six of the corporations on the ground that to do so would tend to incriminate or degrade him. (R. 2817–2819.)

Giglio was then taken before Judge F. Dickinson Letts, Davis,

who was informed of the pending informations by Giglio, and who directed Giglio to answer the questions. (R. 2819–2825.) Upon returning to the grand jury room, Giglio named five locations where the corporate books and records might be stored. (R. 2827–2829.) Leone advised him that it was the grand jury's wish that he produce the material in the New York area the next morning and the material in the Chicago area one week later. (R. 2831–2832.) During the following weeks, Giglio produced eighty cardboard cartons of records, including partnership records. (R. 2832–2836.)

On September 2, 1952, Giglio again appeared before the grand jury and, when asked whether he had produced all the books and records of the American Brands Corporation, he explained that he had retained some of them in reliance on his constitutional rights and that his attorney had just filed a motion to quash the subpoena in part. (R. 2835–2839.) After conferring with his attorney, the witness again admitted that he possessed certain records of the American Brands Corporation but refused on constitutional grounds to describe them. (R. 2839–2840.) Leone advised him to consult with his attorney and on the following day to respond to the subpoena to produce any and all records. (R. 2840–2842.)

The next day Giglio refused to produce the remaining records of the American Brands Corporation and was taken before Judge Weinfeld who directed him to produce them. (R. 2842–2854.) On September 4 Giglio complied with this order and also pro-

duced the "minute book of American Agar Corporation which was not required but I guess it can stay here." (R. 2855–2856.) Leone then requested him to produce the books of four other corporations still in his possession, and on the following day he produced sixteen such books. (R. 2857–2860.) He stated that, pursuant to an agreement between his attorney and Leone, he still retained certain records called for by the subpoena which "would be personal and so forth" but that "You now have all the corporations you are asked for here." (R. 2864.) No personal records were produced. (R. 48–57, 85, 87.)

On September 15, 1952, Judge Ryan quashed the subpoena as to the books and records of the three partnerships except as to those "he may have already produced." (R. 2865.)

On October 20, 1952, six indictments were returned against petitioners and Roth, charging them, *inter alia*, with the same offenses later recited in the 1953 indictment (*supra*, p. 4). On March 27, 1953, Judge Goddard (R. 2866–2871) dismissed the six indictments on the grounds that (1) it was a violation of petitioners' privilege against self-incrimination to compel them to take the stand in the grand jury proceedings since they had already been named as defendants in the pending 1950 criminal informations, and (2) it was a violation of Meglio's privilege to compel him to produce partnership records. *United States* v. *Leone*, 115 F. Supp. 674. The decision directed the Government to return the "partnership and personal records" produced by them in response to the subpoena. The Government filed a notice of appeal,

and, pursuant to a stipulation of the parties, the
turn order was stayed pending the appeal. The r
ords were subsequently impounded by the Court.
October 19, 1953, the Government's appeal was d
nissed as not timely filed. *United States* v. *Roth*, 2
F. 2d 467 (C. A. 2).

On July 23, 1953, less than two months before pro
cution of many of the substantive offenses charg
would have been barred by the statute of limitatio
a fresh indictment—the present one—was brought b
new grand jury. None of the petitioners had testifi
or produced records before this grand jury. The
after, petitioners moved to dismiss the indictment and
suppress "tainted" evidence. In this connection, th
requested inspection of the 1953 grand jury minu
and a hearing to ascertain whether any of the "tainte
1952 evidence was used directly or indirectly
obtain the new indictment. (R. 26–27.) Judge P
mieri denied these motions but ordered the return
the personal and partnership records which had be
produced by the petitioners. (R. 179–185.) *Uni
States* v. *Giglio*, 16 F. R. D. 268. Similar motions
dismiss were later denied at the trial by Judge Wal
(R. 214–247, 2505.)

SUMMARY OF ARGUMENT

I

Petitioner Lawn's principal contention is that the
at the trial of a particular photostatic copy of a ch
violated his privilege against self-incrimination.
allege that the copy used was obtained at the 1
grand jury proceeding which, he says, violated
rights.

1. Two months prior to the 1952 grand jury proceeding, a hearing was held at petitioner's request at which time he was formally advised of his constitutional rights and told that any answer he made might be used against him in pending or other criminal proceedings. Petitioner was former Chief of the Criminal Division of the United States Attorney's office in New Jersey. Questioned by his own counsel under oath, petitioner voluntarily discussed the particular check for $153000 and then provided the Government with a photostatic copy. We contend that these facts establish a waiver as to the check and all copies. Though not a part of the judicial record before this Court, the proceeding was a formal one at which, at petitioner's request, matters were put "on the record" and "in evidence", and as to the existence of which, we assume, there is no dispute.

2. Judge Goddard's dismissal of the 1952 indictment did not establish as *res judicata* or as the law of the case that the particular check here involved was privileged as to the defendant or that his privilege had been violated with respect to it. Judge Goddard held that *some* of the documents had been obtained from petitioners in violation of their constitutional rights. In fact, petitioner had no privilege against self-incrimination with respect to the particular check which was part of the partnership records of a firm of which he was not a member.

3. The failure to return the photostatic copy of the check made at the 1952 grand jury proceeding was not a violation of any court order. The original check

(and stub) were returned to petitioner at the time of the grand jury proceeding. The court orders did not call for return of copies, as requested by the defendants, but allowed the Government to retain copies for possible use against third parties as to whom no privilege had been violated. That petitioner (who had delivered only four documents to the grand jury) construed the return order in the same way is apparent from his not requesting the copies which he knew were made. Neither did he object when the photostat was introduced in evidence although it was carefully examined by counsel.

4. Exhibits 61A and 61B are a $15,000 check and corresponding stub to petitioner. It was by far the largest check to petitioner introduced at the trial and one as to which he had been questioned for years. In examining the check and stub when they were offered and then announcing "no objection," petitioner waived any privilege against self-incrimination he might still have had with respect to them, and also any objection as to why alternative copies were not used.

5. By offering in evidence one photostatic copy of the check and stub rather than another, the prosecutor committed an inadvertent mistake without the least possible prejudice to petitioner. One copy was no more or less incriminating than the other. If objection had been made, the other copy could have been offered. There was no unfairness whatever.

II

Petitioner charges that the prosecutor's statement in summation that he vouched for two witnesses, because "we think they are telling the truth," was a flagrant error which must require reversal even though no objection was made by experienced defense counsel at the time. It is hornbook law that the party who puts on a witness vouches for his credibility; this underlies the general rule that a party cannot impeach his own witness. We see no error in explaining this to the jury on summation where there is no suggestion that the prosecutor has independent knowledge as to the truth or falsity of the testimony.

Further, defense counsel had based his summation on the theory that government witnesses Lubben and Roth were lying and that the case had been started in bad faith by a previous prosecutor. He then stated that the present prosecutors "had been instructed, or in my opinion they never would have done this." The prosecutor's summation was certainly justified in response to the suggestion that he was knowingly using false witnesses, and perhaps even necessary to rebut the implication that petitioner was being deprived of his constitutional rights by the prosecution's knowing use of perjured testimony. Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

III

Petitioner was accorded a full opportunity to attempt to establish that allegedly tainted evidence was being used by the prosecution at the trial. The record shows that defense counsel was never denied the chance to cross-examine where the purpose was to show the use of illegal evidence at the trial—as distinguished from its possible use before the grand jury which returned the indictment. The judge also accorded the defense other procedural safeguards to make sure that none of the allegedly tainted evidence, or evidence derived therefrom, was used at the trial.

This issue is dealt with in full as Point II of the Government's brief in the companion case, *Giglio and Livorsi* v. *United States*, No. 10, this Term, which is incorporated by reference in this brief. (Gov. Br. No. 10, pp. 19-35.)

IV

There was abundant evidence to support the verdict. Petitioner is mistaken in arguing that the jury could not rely on evidence of his conduct after the income tax returns were filed in September 1947. The conspiracy was one not only directed at failing to disclose income but also at evading the payment of taxes—a conspiracy which it was charged continued up to the date of the indictment. Neither the prosecutor nor the judge said otherwise.

Although petitioner played a smaller role in the scheme than did either Giglio or Livorsi with whom he has been convicted as a co-conspirator, there is substantial evidence both as to a course of conduct

and as to particular incidents in which petitioner played a part. He was instrumental in organizing the group of corporations which earned much of the untaxed income and then in running them through a New Jersey receivership after the funds had been taken out of them in various ways, largely by Giglio and Livorsi. The fact that petitioner did not personally have a large monetary stake in the untaxed income does not relieve him from criminal responsibility for his part in defeating the payment of over half a million dollars in income taxes in one year. We believe there was certainly sufficient evidence as to the conspiracy count, and also enough evidence to support the concurrent sentences on counts 7 and 9.

The Court of Appeals for the Second Circuit reviewed the evidence in detail and found it "conclusively establishing the guilt of these appellants".

ARGUMENT

I

EXHIBITS 61A AND 61B WERE NOT ILLEGALLY OBTAINED, WERE NOT COVERED BY THE PRETRIAL ORDERS, AND THERE WAS NO ILLEGALITY IN THEIR USE AT THE TRIAL. NO OBJECTION WAS MADE AND ANY ERROR WOULD HAVE BEEN HARMLESS

Before the 1952 grand jury petitioner Lawn produced four documents which were photostated and the originals returned. (R. 2802.) One of these was a check to petitioner for $15,000, and another was the corresponding check-stub. Indictments brought by that grand jury were dismissed by Judge Goddard on the ground that some of the evidence before it was

obtained in violation of the privilege against self-incrimination. (R. 2866–2873.) At a trial on a fresh indictment photostatic copies of the $15,000 check and stub were offered in evidence and examined by defense counsel, who announced "No objection." (R. 1022.) The foundation of petitioner's case is the claim that his constitutional rights were violated by the use at the trial of one particular photostatic copy of this check and stub—Exhibits 61A and 61B—rather than the photostatic copy to which he thought he was making no objection. We submit that this claim is without factual or legal basis.

The point which now forms the principal ground urged for reversal was first made "just before the appeal was argued in the Court below" (Br. 16). It is based on a theory analogous to newly discovered evidence and rests on assertions and factual assumptions outside the record. In effect petitioner, before the Court of Appeals, offered to show (*a*) that Exhibits 61A and 61B had been reproduced by photostatic methods on the same day that Lawn appeared before the first Grand Jury, (*b*) that they had been made from copies produced by petitioner rather than from other copies of the same documents already in the hands of the government or produced by other independent witnesses, (*c*) that petitioner had a Fifth Amendment privilege as to those documents, (*d*) that he had not waived his privilege either previous to the Grand Jury proceeding or thereafter, (*e*) that the particular photostatic copies were ones which were governed by prior orders of the court, (*f*) that their use at the trial, under the circumstances, violated

petitioner's constitutional rights, and (*g*) that the Government had available no other copies of the identical documents which could have been used at the trial had objection been made.

In the Court of Appeals the Government offered to prove that petitioner had no constitutional privilege against self-incrimination as to Exhibits 61A and 61B because those documents had been voluntarily produced months before and copies were in the Government's possession. (R. 2971.) In this Court petitioner again charges misconduct and, in an attempt to demonstrate prejudice, makes new allegations as to the "naked facts" (Br. 19, 26).

It is our view that the record, by itself, adequately demonstrates that there has been no violation of petitioner's constitutional rights and no prejudice. If, however, petitioner's present charges are not answered in full by the judicial record it is because they were not raised at the trial. In answer to his serious charges of misconduct and prejudice, this brief, in elaboration of the Government's offer of proof in the Court of Appeals, refers to facts known to petitioner Lawn which, though not in this record, we assume are undisputed.

I. IN MAY 1952 PETITIONER KNOWINGLY WAIVED ANY PRIVILEGE AS TO THIS CHECK AND STUB AND FREELY GAVE THE GOVERNMENT A COPY

On May 12, 1952, two months before the first grand jury proceeding, Lawn appeared before a formal hearing held at his request at the Federal Building in Newark. There he was specifically advised of his

constitutional rights, told that he was being permitted to "testify preceding a proposed criminal prosecution" and warned that his answers might be used against him in any proceedings which the Government might bring. (App. A, *infra*, p. 73.) Lawn, as a former Chief of the Criminal Division of the United States Attorney's office in New Jersey, was undoubtedly familiar with his rights. He was accompanied by an attorney, Edgar H. Rossbach. Petitioner freely volunteered information about the check of which Exhibit 61–A is a copy and agreed to provide the Government with photostatic copies of the check and the stub, which was done three days later.[12] Petitioner's conduct, two months prior to the first jury, was thus a full, voluntary, knowing, and formal waiver of his privilege against self-incrimination as to the check and stub.[13] It was done in a proceeding at which, at petitioner's request, matters were put "on the record" and "in evidence."

Petitioner thus is in the position of standing before this Court claiming a violation of his constitutional privilege against self-incrimination with respect to documents as to which he had long since waived his

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[12] See copy of receipt dated May 15, 1952, filed with the Clerk: Appendix B, *infra*, p. 77.

[13] The Government already had a copy of the check made from the microfilm copy kept by the bank, *i. e.*, a copy of the check prior to its perforation and indorsement by the bank. This copy was forwarded on April 17, 1952, as Exhibit 6 to Preliminary Report #2 of agents Mahon and Twohig on Howard M. Lawn. The report was sent from the New York division of the Intelligence Unit to Chief, Intelligence Division, Bureau of Internal Revenue, Washington 25, D. C.

privilege and voluntarily delivered photostatic copies to the Government. Cf. *Perlman* v. *United States*, 247 U. S. 7.

2. JUDGE GODDARD'S ORDER DISMISSING THE 1952 INDICTMENTS DOES NOT ESTABLISH THAT THE CANCELLED CHECK AND STUB WERE PRIVILEGED. PETITIONER HAD NO PRIVILEGE WITH RESPECT TO THEM BECAUSE THEY WERE THE PROPERTY OF THE TAVERN FRUIT JUICE COMPANY

Despite our view that Judge Goddard's decision dismissing the original indictments, *United States* v. *Lawn*, 115 F. Supp. 674, was erroneous, we do not propose to argue that point here nor to contend that that decision is now open for review.[13] But that decision did not hold what petitioner contends.

[13] As pointed out *supra*, p. 34, an appeal by the Government was dismissed as not timely filed.

In dismissing the 1952 indictments, Judge Goddard ruled (*a*) that it was a violation of petitioners' rights under the Fifth Amendment to compel them to take the stand in a related grand jury proceeding since petitioners had been named as defendants in the 1950 informations, and (*b*) that it was a violation of Giglio's rights to compel him to produce partnership records despite his claim of privilege (R. 2866-2871). We think the court was mistaken on the law as to the first ground and mistaken on the facts as to the second. In any event, even assuming *arguendo* that both grounds were correct or that the principle subsequently established by this Court in *Garcia* v. *United States*, 354 U. S. 118, might have furnished another ground, it would appear that the jurisdictional basis of Judge Goddard's decision was swept away by this Court's decision in *Costello* v. *United States*, 350 U. S. 359, holding that the alleged incompetency of evidence used in grand jury proceedings affords no ground for seeking a dismissal of an indictment returned by the grand jury. See also *Hale* v. *United States*, 218 U. S. 245.

The judge found that *some* of the papers produced by the defendants were obtained from them in violation of their privilege against self-incrimination—not *all* of the papers which they produced. For example, the court explicitly pointed out that among the papers which the defendants were required to produce were the books and records of the American Brands Corporation and seven other corporations, 115 F. Supp. at 676, and held that "A custodian of corporate records held in a representative capacity may be required to produce them for no privilege attaches to such records." 115 F. Supp. at 676.

The decision does not establish whether a particular document was privileged or unprivileged; whether it was a corporate paper or a personal paper; or whether it was among those documents which were properly obtained or among those which were obtained in alleged violation of the rights of one or more of the defendants. In particular, the decision did not hold that petitioner Lawn had a valid personal privilege against self-incrimination as to the cancelled $15,000 check of the Tavern partnership or that that particular document was "tainted". Nor did it retroactively re-establish a privilege previously waived. "The agents did not become trespassers *ab initio* when they took the check." *Zap* v. *United States*, 328 U. S. 624, 629. "A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained." *United States* v. *Lee*, 274 U. S. 559, 563. See *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392: "Of course this does not mean that the

facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *."

In any event, we believe petitioner Lawn had no privilege with respect to these documents. Before the Grand Jury in July 1952, he testified that they were documents of the Tavern Fruit Juice Company, a partnership of which he was not a member. (R. 2798, 2803.) At that time he also testified that he had obtained the documents from Giglio, one of the partners, approximately ten weeks earlier. (R. 2803.) Since the original documents were documents of a partnership of which petitioner was not a member, and since the papers were neither his personal records nor ones in his personal possession in regular course, independently of the investigation directed toward him, it seems clear that he did not have a constitutional privilege with respect to them. *United States* v. *White*, 322 U. S. 694; *see Curcio* v. *United States*, 354 U. S. 118, 122, and cases there cited. Certainly one cannot put the cloak of the Fifth Amendment around business records of other firms or persons simply by getting them into one's custody or possession.

3. NEITHER DISTRICT COURT ORDER FOR THE RETURN OF DOCUMENTS APPLIED TO COPIES MADE BY THE GOVERNMENT, NOR DO EITHER PARTY CONSTRUE THE ORDERS AS APPLYING TO THE PARTICULAR PHOTOSTATS

Following Judge Goddard's decision dismissing the original indictments the defendants submitted a draft order which would have required the Government to

return all original documents produced before the first Grand Jury and all copies which it had made. (R. 111–112.) The Judge, however, signed an order similar to one submitted by the Government (R. 80) which required only the return of original documents. (R. 2872–2873.) Before Judge Palmieri the defendants sought an order suppressing the use of all copies. (R. 26–27.) The Government at that time argued that it should be allowed to retain copies, which might legitimately be used by the Government, for example as evidence against third parties. (R. 99, 142–143, 279.) Judge Palmieri denied the motion to suppress and limited his order to the original documents. (R. 183–184.) Leaving aside the question of use, it is thus clear that the *retention* by the Government of a photostatic copy of the check and stub produced before the Grand Jury by petitioner did not violate either return order. Petitioner's repeated allegations of violation of court orders (Br. 13, 14, 18, 22, 31) are wholly unfounded. Even as to the originals, Judge Palmieri construed the return order as applying to the "illegally obtained material" (R. 184), which would not include documents as to which privilege had previously been waived. Here the originals were returned to petitioner on the day he appeared before the grand jury.

Moreover, the documents represented by Exhibits 61A and 61B, together with two other checks, were the only documents which petitioner produced before the grand jury. Under the circumstances, if Lawn did not share the Government's view that Exhibits 61A

and 61B were not covered by the return order of Judge Goddard as reinstated by Judge Palmieri, surely petitioner would have objected when those exhibits were not turned over to him after Judge Palmieri's order was issued.

Finally, the fact that petitioner shared the Government's view that Exhibits 61A and 61B were not covered by the return order is demonstrated by his failure to object to their admission in evidence even though they clearly appeared to be the photostatic copies which the Government made of the documents which he produced before the grand jury. In this connection, petitioner argues (Br. 17–18) that the telltale evidence was hidden on the back of the photostats which showed that they were made by the Government on July 15, 1952, the day on which he produced the original documents before the grand jury. But the same date was on the face. The real identifying evidence was the bold grand jury markings "G. J. Ex. 2, 7/15/52" and "G. J. Ex. 4, 7/15/52," with the initials of the foreman of the grand jury. (R. 2998, 3000). These markings were put on the original documents, of which Exhibits 61A and 61B are photostatic copies, by the grand jury in petitioner Lawn's presence at the time he produced those documents. (R. 2802.) Accordingly, the only credible explanation of Lawn's consent to the admission in evidence of Exhibits 61A and 61B is that he agreed with the Government that these exhibits were not covered by the return order.

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4. PETITIONER'S CONDUCT AT THE TRIAL WAS AN INDEPENDENT WAIVER OF ANY CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION AS TO THE CHECK OR STUB

When Exhibits 61A and 61B were offered in evidence by the Government, petitioner's counsel conducted a preliminary examination, which included a careful scrutiny of the handwriting of the various portions of the check and the stub. (R. 1021–1022.) There was only one large check to petitioner involved in the entire case and that was this check for $15,000—a check as to which petitioner had been questioned for some years. (Tr. 9–10.) Lawn and his counsel, Lloyd Paul Stryker, were not taken by surprise. If either of them had thought that petitioner had any privilege relating to the check, they decided not to assert it. Mr. Stryker announced "No objection" and the two exhibits were received in evidence. (R. 1022–1023a) Petitioner waived any privilege he might have as to a photostatic copy of those documents and also, under the best evidence rule, any objection he might have as to why the originals or some better copy were not offered instead.

There is no merit in petitioner's theory that Lawn and counsel had no reason to know what was in front of them. As stated above, the identification of the check and stub as exhibits before the 1952 grand jury appeared on the *face* of the photostats. (R. 2998.) The date, 7/15/52, was clearly marked on the side of the photostats which defense counsel was examining so carefully when questioning Roth as to the differ-

ences in handwriting appearing on the check. (R. 1021–1022.) The date on the back of the photostats, on which petitioner now places such reliance is the same as the date on the front, July 15, 1952. The fact that the photostatic print actually offered at the trial was the one made on July 15, 1952, rather than a copy later made from that print is of no significance. Either would be equally objectionable to petitioner since the *face* would show that it was a copy of a 1952 grand jury exhibit.

5. THERE WAS NO POSSIBLE UNFAIRNESS OR HARM IN USING ONE PARTICULAR COPY OF THE CHECK AND STUB RATHER THAN ANOTHER

Petitioner's argument is wholly without merit in law. It is equally without merit in equity. For the Government to offer in evidence photostatic copies of the check and stub made at the time petitioner produced them before the 1952 Grand Jury rather than other photostatic copies of the identical documents was a mistake—it was a mistake because it appeared inconsistent with the affidavits submitted by the prosecutor and his associates (*e. g.*, R. 82, 2948) and because it has led to the contentions which petitioner now raises. But it was an inadvertent mistake and the consequence of the fact that the prosecutor knew the check was admissible in evidence and not privileged. The prosecutor, apparently like petitioner and his able counsel at the trial, had never considered that one photostatic copy of the check would raise any

more question than another. But it was not a mistake that caused any injury to Lawn.

One cannot find the least possible prejudice or unfairness to petitioner in admitting in evidence exhibits 61A and 61B. The fact that the photostats were stamped on the reverse side "Jul 15 1952" made them no more prejudicial than if that stamp had not been there—these copies were no more or less incriminating than those which petitioner had voluntarily supplied the Government or those which the Government had obtained from other sources. They were no more or less incriminating than the copies to which, petitioner now says, he understood he was making no objection. If petitioner had objected to their admission, the Government could promptly have established that he had no privilege as to the check, or introduced other copies.[15]

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[15] Petitioner's suggestion that the Government may have had copies of the check in New Jersey but that they were unknown and unavailable to the Government in New York assumes a degree of clumsiness of which the Government is not guilty. In fact, the full transcript of the May, 1952 hearing at which petitioner waived his rights as to the check was in the office of the United States Attorney for the Southern District of New York by June 10, 1952. This is indicated by the date stamp on the back of one of the photostatic copies of that transcript which we have filed with the Clerk.

And we need hardly point out that when petitioner voluntarily delivered a photostatic copy of the check to the Government in New Jersey and agreed that it could be used against him "in any proceedings which the Government may bring" any privilege he had with respect to the document was gone in New York—as well as elsewhere.

II

THE PROSECUTOR DID NOT EXCEED THE BOUNDS OF PROPRIETY AND FAIRNESS

Petitioner contends (Br. 34–44) that the prosecutor "flagrantly violated" the proper standards of conduct so as to deprive petitioner of a fair trial and that "this plain and egregious error requires reversal irrespective of trial objection" (Br. 34, 42). Petitioner's distinguished and experienced trial counsel made no objection whatsoever to the prosecutor's summation. The allegations were first raised by present counsel in the Court of Appeals, which not only found them to be without merit but so unwarranted as to be subject to criticism (R. 2972):

> We are constrained to say that the presentation of this appeal was marred by a virulent attack, particularly on behalf of appellant Lawn, upon the integrity and the ethics of the prosecutor. An examination of the record shows that this was utterly unwarranted. On the contrary, he and his associates conducted the prosecution with devotion, responsibility, and rare skill against experienced and determined defense. We do not think that even the exigencies of the defendants' case justified or excused this attack. The trial was fair and the result proper, if not inevitable.

The main complaint here (Br. 35–37, 43) is that in summation the prosecutor made the following com-

ments with respect to Government witnesses Lubben and Roth (R. 2587–2588):

> I vouch for Lubben. The Government put Lubben on the stand because it thought that Lubben could be vouched for.
>
> I vouch for Roth also. * * *
>
> I vouch for them (and I will explain precisely why I do in just a moment, but I vouch for them). When I say "I", I am referring to the District Attorney's office, and I merely represent them. We vouch for them because we think they are telling the truth.

There was no objection.

The remarks of the prosecutor on their face, we submit, were unobjectionable. It is the general common law rule that the party who puts on a witness, "under familiar rules of evidence, vouches for his credibility." E. g., *Bowles* v. *Marx Hide & Tallow Co.*, 153 F. 2d 146, 147 (C. A. 6). In a case before the Second Circuit where objection had been raised "to certain expressions by the prosecutor of belief in the government's witnesses and in the guilt of the accused" that court pointed out:

> Of course this affirmation of belief merely put into words what the very fact of prosecution implied; * * * [*United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C. A. 2)]

To laymen jurors, who might not be aware of the considerations governing the presentation of witnesses, we see no error in the prosecutor's thus stating the law. There was no suggestion in his remarks that he was basing his conclusion on facts outside the record before the

jury or that he had independent knowledge of petitioner's guilt.

When viewed in context there can be no doubt as to the propriety of the prosecutor's remarks. The case for petitioners, as presented to the jury, pivoted upon the contention that three of the Government's principal witnesses, Roth, Lubben and Bereu, were perjurers. The core of the opening statement for the defense (R. 2901–2923) was the assertion that Lubben and Roth were unworthy of belief (R. 2911–2915); and from start to finish of his final summation to the jury (R. 2507–2585) defense counsel hammered at the theme that "* * * looking at the case any way you wish, it gets back to Lubben, Roth and Bereu" (R. 2508), and that the Government's case rested "solely" upon them (R. 2579). In addition, the defense repeatedly sought to convey to the jury, in the opening statement and in the summation, the idea that the whole case was a gigantic persecution of petitioners stemming from a group of internal revenue agents led by Special Agent James J. Twohig (R. 2903–2912, 2917–2919, 2521, 2531–2537, 2557, 2566), and Twohig was accused of procuring the testimony of Lubben, Roth and Bereu, though aware that they were utterly unreliable (R. 2514–2515, 2517–2520, 2532–2534, 2535–2536). Moreover, Assistant United States Attorney Leone, who obtained the original indictment in 1952, was accused of cooperating with Special Agent Twohig to institute the proceedings in bad faith. (R. 2904–2908.) At the outset the defense expressed gratitude that the jury, and not the agents, would

decide the facts (R. 2908); in conclusion the jury was urged that "This is no case for Internal Revenue Agents to decide" (R. 2583); and petitioners were referred to as "these victims of Lubben and Leone" (R. 2915).

Defense counsel took pains, however, to make it clear that his accusations did not apply to the incumbent United States Attorney or his staff. He pointed out to the jury that Leone had resigned shortly after Judge Lumbard became United States Attorney and went on to say (R. 2904, 2905):

> * * * And what I am about to say, what I will prove Mr. Leone's actions were, I want to make as clear and positive as I can, is in no wise a reflection of any kind on Judge Lumbard, whom I greatly respect and admire, nor is it a reflection on these gentlemen here who are prosecuting this case. *They are not responsible for it at all;* they just inherited what was done, and they had a job to do and that was their job, and it is all right.
>
> * * * * *
>
> * * * Again I am not referring at all to Mr. Wessel [the prosecutor] or Judge Lumbard or his office. *They had been instructed, or in my opinion they never would have done this.* [Emphasis supplied.]

Clearly this could not go unanswered. When the defense in one breath charged that the prosecution had been instituted in bad faith in knowing reliance upon untrustworthy witnesses, and in the next asserted that the present prosecutor was "instructed" or "never would have done this," there was only one possible

answer, *i. e.*, that the United States Attorney and his staff fully believed that Roth and Lubben were now telling the truth or they would not otherwise have proceeded with the trial.[16]

Thus, in context, the prosecutor's expression of confidence in the Government's witnesses was amply justified. Remarks that might be considered as improper when standing alone acquire a new cast when viewed with reference to matters raised by opposing counsel's arguments. *Schino* v. *United States*, 209 F. 2d 67 (C. A. 9), certiorari denied, 347 U. S. 937; *Springer* v. *United States* 148 F. 2d 411, 414 (C. A. 9). Moreover, as we have indicated, petitioners' counsel made no objection to the argument. The proper time to object to a prosecutor's remarks is when they are made, so that the alleged error can, if possible, be corrected. *Crumpton* v. *United States*, 138 U. S. 361, 364; *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C. A. 8); *United States* v. *Kortepeter*, 114 F. 2d 124, 128 (C. A. 7), certiorari denied, 311 U. S. 711; *Jarvis* v. *United States*, 90 F. 2d 243, 246 (C. A. 1); *Mendelson* v. *United States*, 58 F. 2d 532 (C. A. D. C.); *McIntosh* v. *United States*, 1 F. 2d 427, 429 (C. A. 7).

A prosecutor may express his individual belief in

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[16] The trial judge, at time of sentencing, indicated that he, too, had believed the witnesses (R. 2740):

> I heard the cross-examination of Lubben and Roth, both of whom impressed me as telling the truth. They are people who got into your [petitioners'] toils and then tried to work their way out, and they suffered the tortures of the damned.

Roth did not, as petitioner asserts (Br. 35), admit lying on the trial of this case (R. 1261–1262).

the guilt of an accused if it is based solely on the evidence adduced, and the jury is not led to believe there is other evidence, known to the prosecutor but not introduced, justifying that belief. Cf. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C. A. 6); *United States* v. *Holt*, 108 F. 2d 365, 370 (C. A. 7), certiorari denied, 309 U. S. 672; *Tuckerman* v. *United States*, 291 Fed. 958, 969 (C. A. 6), certiorari denied, 263 U. S. 716. *Berger* v. *United States*, 295 U. S. 78, cited by petitioner, involved a situation where the prosecutor referred to matters outside the record.

The remarks of the prosecutor here were not only proper in themselves under the cases cited above, but were justified as responsive to the unwarranted charge by counsel that the prosecution was so intent upon obtaining a conviction that it was willing to disregard the unrealiability of its witnesses. Cf. *Gridley* v. *United States*, 44 F. 2d 716, 739 (C. A. 6), certiorari denied, 283 U. S. 827; *United States* v. *Battiato*, 204 F. 2d 717 (C. A. 7). The remarks may even have been a necessary precaution to avoid appearing to accept a charge which would have meant petitioner was being deprived of his constitutional rights. Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

Any possible prejudice from the prosecutor's responsive remarks, indicating that he believed the witnesses were telling the truth, was corrected by the judge's charge to the jury, telling them that they were the only ones to determine credibility of witnesses. The judge devoted three pages to this point (R. 2684–2686) and called particular attention to the fact that Roth was an accomplice and that "you have got to be

particularly careful in scrutinizing his testimony to see whether to save his own skin he lied to hurt somebody else or whether he had some other motive for lying to hurt somebody else." (R. 2686.) And as to Lubben the judge charged: "* * * I am going to tell you to be just as careful with his testimony as you would with an accomplice, and look and scrutinize it carefully." (R. 2686.)

Petitioner's other complaints relating to the prosecutor's conduct are also without substance. These points relate to statements made by the prosecutor (*a*) in the course of his summation to the jury, and (*b*) during the trial.[17]

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[17] Petitioner levels another attack (Br 40) on the witness Lubben, contending that he "refused to answer questions on cross-examination" and that his "answers were utterly unresponsive". With respect to this it should be noted that several days after Lubben left the witness stand, the trial judge, without the presence of the jury, made the following statement to defense counsel (R. 1684–1685):

> * * * incidentally, your comment about 17 pages to get an answer from Mr. Lubben, I don't want my failure to take issue with you to indicate that I agree with you.
>
> I think that some of your questions were not simple, as you would suggest; that there were, I don't say with deliberate intent, but nevertheless, there were distortions of what the witness thought the facts were, and Mr. Lubben, to say the least, is cross-examination shy, having been cross-examined in goodness knows how many proceedings, as to his previous testimony, and he was a person who was not going to give a yes or no without having the question in exactly the form he thought he could say yes or no to.
>
> I think if there was any mistaken judgment it was perhaps mine in letting you insist on a yes or no answer to some of the questions, and I have, since the experience with Lubben, been less insistent on such answers.
>
> I just think that we lost a lot of time in the examination of Lubben insisting on a yes or no when in substance the question had been answered.

(*a*) As we have pointed out, there was no objection whatever to the summation, and petitioner is in no position now to urge that there was error. Moreover, it seems to us that petitioner improperly characterizes the summation. We find nothing there suggesting that Lawn should be convicted "because of the personal characteristics which the prosecutor chose to attribute to Lawn" (Br. 38); or relating to "collateral crimes not material or established by the evidence", or physical threats by Lawn (Br. 39); or otherwise departing from the record or improperly characterizing the evidence.

(*b*) It is natural enough that in the course of a six weeks trial the prosecutor may have made several comments which displeased the defense. The contentions with respect to these are (1) that the prosecutor expressed the opinion that Lawn would probably "intimidate or tamper with the witness Roth * * * and * * * would improperly approach another Government witness" (Br. 39); and (2) that the prosecutor stated "I would like to see the Tavern and Eatsum books" (Br. 40). The record supports only the latter contention. But it can hardly be said that by this comment during a colloquy with the judge (which chief defense counsel did not even hear until advised of it by a colleague (R. 2410)) the prosecutor "dramatically informed the jury that defendants had not produced the partnership books" (Br. 40).

Defense counsel was seeking to introduce in evidence expert testimony, based on an analysis of financial records, which assumed that obligations of Tavern and Eatsum were worthless. The prosecutor objected

on the ground that there was no adequate foundation as "Those books are not in evidence." (R. 2407.)

The remark now criticized was in response to defense counsel's renewed effort to introduce conclusory testimony without proper foundation. The Government's objection was sustained. (R. 2410.) A reading of this part of the record will demonstrate that there was no error. Further, the jury was well aware that some, but not all, of these partnerships' papers had been put in evidence in a piece-meal fashion by the defense. (*E. g.*, R. 738–743, 769, 773, 787–790, 796–797, 811–812, 1048–1049.) There was no suggestion that the reason they were not in evidence was the privilege against self-incrimination. Finally, petitioner fails to indicate how comment as to the books (of which he was not custodian) of a partnership of which he was not a member "invaded Lawn's constitutional privilege" (Br. 40).

We submit that the argument that the prosecutor was guilty of misconduct is without merit, and that the Court of Appeals was justified in condemning it as "utterly unwarranted." (R. 2972.)

III

PETITIONER WAS ACCORDED FULL AND ADEQUATE OPPORTUNITY FOR CROSS EXAMINATION AND OTHER SAFEGUARDS AGAINST THE USE OF ALLEGEDLY TAINTED EVIDENCE AT THE TRIAL

As his third argument (Br. 44–48) petitioner Lawn contends that he was denied due process by the alleged failure of the district court to provide him an opportunity to determine whether there was use at the

trial of illegal evidence or leads based on such evidence. This issue is one of the principal contentions raised by petitioners Giglio and Livorsi in No. 10, this Term, to be argued immediately following this case. We deal with the issue fully as Point II of our brief filed in that case (Gov. Br. No. 10, pp. 13-35) to which the Court is respectively referred. All three petitioners, Lawn, Giglio and Livorsi, were represented by the same counsel at the trial and the issue is whether he was there given adequate opportunity to determine whether any of the evidence used at the trial had been illegally obtained from the petitioners. We submit that the record shows that he was given every opportunity for cross examination for that purpose and that petitioners were accorded other safeguards as well to the same end.

Petitioner Lawn's position appears to differ from that of his co-defendants.

Petitioners Giglio and Livorsi also claim that they should have been given an opportunity to explore what evidence was before the grand jury which brought the indictments here involved. We read petitioner Lawn's brief as limiting his claim as the right to—

> * * * a hearing or the right to cross-examine Government witnesses on the uses made by the prosecutor *on the trial* of evidence unconstitutionally and illegally obtained * * *. [Br. 41, emphasis supplied.]

We believe Lawn is legally sound in so limiting his argument, and—going further—are in general agree-

ment that under the circumstances he had a right to cross-examine for the purpose of discovering the sources of the evidence used *at the trial*. Our position, as elaborated in Point II of the brief in No. 10, is that that right was accorded him.

Should we be mistaken in construing Lawn's position, and if, in fact, he too claims the right to "go fishing" as to the evidence before the grand jury, we respectfully refer the Court to Point I of the Government's brief in No. 10, this Term, where we deal with that contention by Giglio and Livorsi. (Gov. Br. No. 10, pp. 11–19.) Our position as to that argument is, in sum, (1) that a defendant has no right to go behind an indictment valid on its face, of a legally constituted and unbiased grand jury, to determine the sufficiency or propriety of the evidence upon which it acted, *Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359; and (2) that even if in some circumstances there might be such a right, both lower courts found that the claim that this grand jury considered "tainted" evidence had no such solidity as to justify going behind the indictment in this case.

IV

THERE WAS ABUNDANT EVIDENCE TO SUPPORT THE VERDICT

Finally, petitioner contends (Br. 48–78) that the evidence was insufficient to establish his guilt on each of the three counts (Nos. 7, 9 and 10; R. 14–21). So related

he was convicted.[18] He supports that contention by ignoring much of the evidence[19] and by reaching factual conclusions which were apparently not shared by the jury. The trial judge sentenced petitioner to one year rather than the fifteen years given Giglio and Livorsi in recognition of the *smaller role* he played, but found no shortage of evidence. (R. 2927.) The Court of Appeals reviewed the evidence in detail and found it "conclusively establishing the guilt of these appellants". (R. 2968.) We share that view.

Underlying petitioner's argument is his assertion that no evidence of events after the middle of September 1947 can be considered. Petitioner states (Br. 67, 69):

> * * * the conspiracy to conceal necessarily ended also with the filing of the tax returns (R. 2716, 2718) and the prosecutor so conceded (R. 2890).
>
> * * * * *

---

[18] Petitioner makes two arguments which we do not consider require answer. He argues that when the judge declared a mistrial as to the American Brands Corporation as to count 10 (because the jury failed to return any verdict) and dismissed that portion of the indictment (R. 2747) this amounted to adjudication of innocence of American Brands of count 9 and that that required the acquittal of petitioner on count 10. (Br. 48-49.) He also argues that, under Section 145 (b), the only way to evade a tax is to file a false return; that an organized conspiracy to avoid payment of taxes by filing late returns, taking money out of the corporations and putting them through receivership is not a crime. (Br. 50-54.) We think neither point has any merit.

[19] For example, his schedule of "testimony" (Br. 80) does not include the documentary evidence or exhibits before the jury.

> To be connected with the conspiracy, any such alleged concealment through the New Jersey receivership would have to antedate September 12–15, 1947, when the returns were filed. The Judge so charged (R. 2717, 2718).

These statements as to a concession by the prosecutor and a charge by the trial judge are erroneous. The prosecutor, in his opening statement (R. 2890) said that the conspiracy "culminated", *i. e.*, reached its highest point, in the middle of September, 1947. This is hardly a concession that it terminated at that time. At the cited reference (R. 2717; emphasis added), the judge charged the jury: "Now we come to count 9, which is that from on or about the 1st day of January 1946, *up to the date of the filing of this indictment* * * *" Giglio, Livorsi, Lawn and Roth attempted to evade the payment of taxes owing by American Brands. The charge that concealment must have prevented the collection of the tax "when it was due" (R. 2718) is hardly an instruction that the jury must ignore all concealment after the day on which the returns were filed.

On the conspiracy count (count 10) the evidence appears overwhelming. In mid-1945, when David Lubben became associated with the Giglio-Livorsi enterprises, Giglio advised Lubben that Lawn (R. 329):

> was a former United States District Attorney, and that he had a terrific entry with some of the highest government offices and that he was a part of the organization, and that he [Giglio] felt that Mr. Lawn was there to prevent any trouble.

The record shows that Lawn was a man of some degree of influence both within and without the Giglio-Livorsi organization. Before Giglio would approve going ahead with the black market corn syrup arrangements (*supra*, pp. 8–9) he stated that he would "check it with" Lawn. (R. 318.) Soon thereafter, Giglio told Lubben that he should no longer concern himself with buying the corn because Lawn "had much better connections and that he would take care of it". (R. 333.) Lawn verified this, and told Lubben that he had "terrific connections" in the West, and could arrange to buy the black-market corn "better and cheaper and faster". (R. 333, 1092.) When Lubben had discussions in Giglio's office (which was next door to Lawn's), Lawn would frequently be present. (R. 327, 329.) It was Lubben's recollection that Lawn was present at the important conference in the fall of 1945, at which Giglio suggested a bold and large-scale tax evasion plan. Giglio stated that the profits of the Eatsum partnership were becoming so large that "something had to be done, and done quick" because Giglio was not "interested in paying a lot of income tax". (*Supra*, pp. 9–10; R. 367.) Giglio said that it had been decided to form a number of corporations to syphon off the profits of Eatsum by means of false invoices;[20] and that after a few months of existence these corporations would be dissolved before

[20] It appears that this part of this scheme (transferring profits from the partnership to the new corporations by means of false invoices) was not carried into effect. Similarly, Lubben refused to indorse a group of checks presented to him by Giglio, who explained: "We just want to get some of this money out of Eatsum Food Products." (R. 369–370.)

it came time to pay the income tax, so that they would not have to pay it. (*Supra*, p. 10; R. 367–368.)

Lawn, as legal adviser, was "instrumental" in organizing the various "American" corporations early in 1946. (R. 1124–1125.) Although Lawn owned only a nominal interest in American Brands Corporation, he was made its vice-president. He was also vice-president of American Agar Corporation, in which he received a 25% interest for his services. (*Supra*, p. 12; R. 1915.)[21] Lawn, in addition to his stock, received substantial cash compensation for his services, including $18,000 from American Brands Corporation in 1946 and $10,196.87 in 1947. (R. 1917; Schedule G to Govt. Ex. 88, of unprinted record.) Though Lawn was not a member of either the Tavern or the Eatsum partnership, he drew a salary of either $250 or $350 per week from Tavern. (R. 1023.) No income tax was withheld on any of these salaries or other drawings. (R. 1183, 1922–1923.) Lawn received a special $15,000 check from Tavern late in 1945—(Govt. Exs. 61–A and 61–B, R. 2998–3001), from which no tax was deducted although it was recorded on the books as a legal expense, and so appeared on a partnership financial statement prepared several months later. (R. 1020.) Later, when Lawn

[21] The corporate records available to the Government did not disclose the names of the officers of the other three "American" corporations. (R. 1915.)

was about to file his income tax return, the records were altered. (R. 1019.)[22]

When Giglio became interested in putting some of the money into a home in northern New Jersey in 1946, Lawn introduced him to the realtor who soon thereafter sold Giglio the $100,000 estate of Senator Barbour. (*Supra,* p. 19.) Lawn was present with Giglio and Livorsi when they persuaded Mike Jacobs, the boxing promoter, to sell Livorsi his estate for $50,000, shortly after Livorsi had offered Jacobs $85,000 for the property. (*Supra,* p. 20.)

Lawn's authority was such that he requested Roth to prepare a false financial statement for American Brands Corporation in the spring of 1946, for the purpose of securing a credit rating from Dun and Bradstreet. Roth complied, and arbitrarily selected figures of $1,000,000 of capital and $500,000 of surplus. (R. 1123–1124, 1130.) Lawn then submitted the statement to Dun and Bradstreet. (R. 1122–1124.)

There was direct proof that Lawn knew the corporate income tax return for 1946 was being filed late, for he signed the request for an extension of time in which to file. (R. 1144–1145.) Several days before the returns were eventually filed, in September, 1947, it was Lawn who was instrumental in helping to conceal Giglio's assets. (*Supra,* pp. 20–21.) Giglio, in Lawn's presence, offered to "sell" his "$100,000 home to

[22] Petitioner's statement (Br. 25) that "The sole testimony was that the $15,000 was a loan * * *" seems less than candid. (R. 1018–1020, 1886–1887, Ex. 58A.) Giglio did not list such a loan among his assets when he went into bankruptcy. (R. 2279–2280.)

Roth, so that Giglio would "have a roof over my head in case the Government assesses me and will not be able to take the house * * *". (*Supra*, p. 20; R. 1220.) Lawn "agreed that it would save Mr. Giglio's home" and said he would have a New Jersey lawyer acquaintance draw up the papers. (R. 1220.) The closing took place in Lawn's office, the papers having been drawn up by Lawn's friend, one Tepper, who handled the closing. Although Tepper did not represent Roth, Roth gave him a check for $200 at Lawn's suggestion in order "to make it look good". (*Supra*, p. 21; R. 1220, 1222.)

Early in December, 1947, several months after the liquidation of the corporate and personal assets of Giglio and Livorsi was virtually complete (*Supra*, pp. 19–21), Lawn, Giglio and Roth discussed the relative merits of receivership and bankruptcy. Lawn suggested that it would be more advantageous to go into receivership in New Jersey. Such proceedings were commenced against American Brands and the related corporations with the filing of a creditor's complaint for about $3,500. (*Supra*, p. 21.) During the receivership proceedings, Roth gave extensive false testimony by pre-arrangement with Giglio and Lawn. (*Supra*, p. 22.)

It was after the filing of criminal informations against petitioners and Roth in 1950 that Lawn's primary value to the conspiracy was put to the test. It will be recalled that Giglio told Lubben in 1945 that Lawn "was there to prevent any trouble" through his connections with "some of the highest government

offices". (*Supra*, p. 8.) Shortly after the informations were filed, Lawn advised Roth that he was well acquainted with an Indiana politician (a former Department of Justice attorney) who in turn was well acquainted with the United States Attorney in New York City; and that it was planned to retain him to try to persuade the United States Attorney to dismiss the informations. (*Supra*, p. 26.) This effort apparently failed. Later, Lawn explained to Roth that the local United States Attorney could be overruled by the Department of Justice in Washington. Lawn proposed to fly to Washington to seek the intervention of an Assistant Attorney General. Later, Lawn told Roth that he had prevailed upon that official; that the Assistant Attorney General had been "very much annoyed that a former Department of Justice man" should have an information filed against him, because "it just isn't done"; that the Assistant Attorney General had telephoned the United States Attorney and asked him to "cancel the information"; that after a heated conversation the latter official refused to comply without written orders to "cancel it"; and that such written orders were never sent. (R. 1237–1239.)

In 1952, when a federal grand jury in New Jersey was inquiring into Lawn's personal income taxes, Lawn asked Roth (who had been subpoenaed to testify) for his version of the handling on the books of the $15,000 check Lawn had received from the Tavern partnership in 1945. (R. 1074–1075.) When Roth

gave his recollection of the matter, Lawn became vehement, told Roth that he was all wrong "and that the manner in which I am explaining it to him will positively put him in jail". (R. 1075.) One or two days after Roth had testified, Lawn asked him what he had testified to. When Roth said he just wanted to forget the whole thing, Lawn replied that it made no difference because the United States Attorney in New Jersey was a friend of his, and "I will know what was done and what was said". (R. 1075.)

When the conspiracy began to fall apart in mid-1953, Roth ruefully told Giglio (*supra*, pp. 27–28; R. 1218–1219):

> I pointed out to him in front of Mr. Livorsi that it isn't my fault, that it is the fault of our depending on the contacts and influence of Jim Ronayne in the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

We submit that the facts reviewed above constitute substantial evidence which warranted the jury's inference that Lawn was not the innocent bystander he now professes to be, but that he was an active and important member of the conspiracy.

Since petitioner's sentence of a year and a day was imposed on each count to run concurrently, the Court should not find it necessary to consider the evidence as to the other counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642. Examination, however, will show that as to counts 7 and 9 there was also an unquestionable basis for the jury's verdict. In particular, Lawn's participation in the concealment of Giglio's assets (count 7) is established by his arranging the transfer of Giglio's $100,000 home to Roth so that the government "will not be able to take the house." (R. 1220.) The surrounding circumstances of cashing a predated check and making the payment for Giglio's equity in currency, all bills of one hundred dollar denomination or less, support the purpose of the transfer. (R. 1219–1234.) Lawn participated in the misappropriation, conversion and diversion of corporate assets to evade the taxes of American Brand Corporation (Count 9). Lawn suggested the New Jersey receiverships (R. 1245), and was present at the meeting at which falsified ledger sheets were submitted and a plan agreed upon whereby the loans due the corporations from petitioners were to be wiped out as corporate assets. (R. 1175–1177.) Throughout 1947, before and after the taxes were due, Lawn and Lawn International drew substantial amounts out

of the corporations in the conspiracy. (R. 1917, 1922–1923.)

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

ROGER FISHER,
Assistant to the Solicitor General.

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Attorneys.

SEPTEMBER 1957.

APPENDIX A

(Excerpts from the transcript of the hearing of May 12, 1952)

IN THE MATTER OF THE INCOME TAX PROCEEDINGS AGAINST HOWARD LAWN

Hearing, held on May 12, 1952, at the Federal Building, Newark, New Jersey, requested by Mr. Lawn.

Appearances:

John Lockley, Special Assistant to the Attorney General
Charles J. Tyne, Assistant United States Attorney
Stanley E. Rutkowski, Assistant United States Attorney
S. Whitman Cordes, Special Agent, Treasury Department
Paul Mahon, Special Agent, Treasury Department
James Twohig, Special Agent, Treasury Department
Edgar H. Rossbach, Esquire
Howard Lawn
William Giglio
Frank Lavarsi [*sic* throughout]

Mr. LOCKLEY. Again, for the record, I would again like to advise you of your Constitutional rights. You may refuse to answer any and all questions that you believe may incriminate you. If you do so elect to

answer any questions put to you, they may subsequently be used against you in any proceedings which the government may bring against you.

Mr. LAWN. I understand.

(Mr. Giglio and Mr. Lavarsi were also made aware of their rights in the same manner as above.)

Mr. LAWN. I assume that it would apply to anyone in this room.

Mr. GIGLIO. Will you please put that in the record?

Mr. LOCKLEY. Certainly.

Will one of you gentlemen administer the oath? I presume all three intend to testify.

Mr. TWOHIG. You have been advised of your Constitutional rights by Mr. Lockley, and I am authorized to take testimony. The statements you will give will be made under oath.

(Mr. Twohig administered the oath to Mr. Lawn.)

Mr. GIGLIO. We do.

Mr. TWOHIG. Mr. Giglio, please repeat the oath after me.

(Mr. Twohig administered the oath to Mr. Giglio. Mr. Twohig administered the oath to Mr. Lavarsi.)

Mr. TWOHIG. The remarks apply to you that I made to Mr. Lawn and Mr. Giglio.

Mr. LAWN. Do you intend to testify, too, Mr. Twohig?

Mr. LOCKLEY. I do not anticipate having anyone testify. It is an administrative hearing permitting you to testify preceding a proposed criminal prosecution.

The Commissioner of Internal Revenue has referred your case to the Department of Justice for prosecution for the year 1945 by filing a false return in the District of New Jersey. Specifically, it is alleged that that return is false, in that you failed to include an item of $15,000 which the Treasury De-

partment asserts is taxable income to you, and we are here to listen to the true nature of the charge. [pp. 1–2]

* * * * *

Mr. ROSSBACH. May I ask this question? Is the particular item of $15,000 represented by a check dated November 7, 1945? Is this what we are talking about?

Mr. LOCKLEY. Yes. [p. 3]

* * * * *

Mr. ROSSBACH. Mr. Lawn, your attention has been drawn to an item of $15,000 which was paid to you made out by a check made payable to you dated Wednesday, November 7, 1945, drawn on the account of Tavern Fruit Juice Company, 360 Troutman Street, and signed by the signature purporting to be Frank Lavarsi. Very directly, was that amount of money paid to you for anything representing income which would be taxable?

Mr. LAWN. Emphatically, no.

Mr. ROSSBACH. What does it represent?

Mr. LAWN. It was a loan made to me by Mr. Giglio paid in a check, which check I deposited in my account, and the check you hold in your hand so indicated on the back. [p. 4]

* * * * *

Mr. LAWN. Let me explain. I asked Mr. Giglio to loan me $15,000. He did. He gave me a check that is in evidence now * * *. [p. 7]

* * * * *

Mr. LAWN. To the best of my recollection, there was a reference to a $15,000 item at that [Kefauver Committee] hearing, and to the best of my recollection, not having had that specifically identified to me at that time, I inferred they must be thinking of this check

and I said that if they were talking of this check, it was a loan. [p. 10]

* * * * *

Mr. LAWN. * * * I want to talk about this check, Ed. [p. 25]

* * * * *

Mr. ROSSBACH. Will you refer to this set of check stubs. Will you describe them.

Mr. GIGLIO. This is the check stub from the check book this check was issued on. * * *. [p. 26]

* * * * *

Mr. LOCKLEY. For the record, I might describe this stub as being three check stubs which has been taken from a loose-ring binder type of check book. The top of the stub bears check number 638 dated November 5, 1945 in a red pencil stamp, drawn to the order of Halloway Corporation on account for sugar, for $2000. Check number 639 was, with a rubber stamp in red, dated November 5, 1945 to the order of Stein-Hall, Incorporated, 15 drums of agaset, $3590, and the last stub is for check number 640 drawn to Mr. Howard Lawn for $15,000 with a rubber stamp in red ink dated November 7, 1945 and written in parenthesis Bill G. Do you know how that stub was carried forward to the books of the company? [p. 35]

* * * * *

Mr. LOCKLEY. I just want the record to show that Mr. Lawn, Mr. Giglio and Mr. Lavarsi have appeared voluntarily at their own request or at the request of Mr. Lawn. No inducements or threats have been made. Is that correct, gentlemen?

Answer by all three: Absolutely correct.

Mr. LOCKLEY. The record should also show the taxpayer, Mr. Lawn, has been offered a copy of the tran-

script of this record at such time as it is completed.

(Short discussion off the record.)

Mr. ROSSBACH. We will supply you, as an Assistant Attorney General——

Mr. LOCKLEY. I am just a Special Assistant.

Mr. ROSSBACH. —and the Department of Justice with photostatic copies of these exhibits that we have referred to today. If there is something more the Department of Justice wants, we will be glad to supply that to them, too. [p. 55]

* * * * *

APPENDIX B

(Receipt for the photostat of check and stub)

MAY 15, 1952.

Received from Edgar H. Rossbach, Esquire, the following photostatic copies:

Check No. 640 dated Wednesday, Nov. 7, 1945, to the order of Howard M. Lawn, signed by Frank Lavarsi [*sic*], in the sum of $15,000.00.

Check No. 298 dated May 10, 1949, to the order of Margherita Giglio, signed by Howard M. Lawn, in the sum of $2,000.00.

Check No. 226 dated May 3, 1949, to the order of "Cash", signed by Howard M. Lawn, in the sum of $500.00.

Three continuous check-book stubs for checks consecutively numbered 638, 639, and 640 for respective amounts of $2,000.00, $3,000.00, and $15,000.00.

1946 Partnership Return of Income for fiscal year beginning April 16, 1945 and ending March 31, 1946, for Tavern Fruit Juice Company, 360 Troutman Street, Brooklyn, New York.

/s/ GROVER C. RICHMAN, JR.
GROVER C. RICHMAN, JR.
United States Attorney.

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